UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

ABB, INC.

and

CASE 14-CA-29219

LOCAL 2379, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

Kathy J. Talbott–Schehl, Esq., for the Government.
Richard Porter, Esq., and Jerry M. Hunter, Esq., for the Company.
Gerald Kretmar, Esq. for the Union

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. This case concerns allegations that ABB, Inc. (Company) unilaterally changed the job description for Code 18 Electronic Electricians without prior notice to Local 2379, United Automobile, Aerospace & Agriculture Workers of America (Union), the production and maintenance employees' exclusive collective bargaining representative; and, after the Union orally requested the Company bargain over the Code 18 Electronic Electrician's job description, the Company has failed and refused to do so. It is alleged job descriptions are mandatory subjects for the purposes of collective bargaining. It is alleged the Company, by its actions, has failed and refused to bargain collectively in good faith with the Union as the exclusive collective—bargaining representative of it employees within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (Act).

-

I shall refer to Counsel for General Counsel as Counsel for the Government or Government.

I shall refer to Counsel for the Company as Counsel for the Company or Company.

I shall refer to Counsel for the Union as Union Counsel or Union.

I heard this case in trial in Jefferson City, Missouri, on June 1, and 2, 2009. The case originates from a charge filed by the Union on January 16, and amended on April 30, 2008, against the Company. The prosecution of this case was formalized on February 27, 2009, when the Regional Director for Region 14 of the National Labor Relations Board (Board), acting in the name of the Board's General Counsel, issued an Amended Complaint and Notice of Hearing (Complaint) against the Company.

The Company, in a timely filed answer to the Complaint, denies having violated the Act in any manner alleged in the Complaint.

5

15

20

25

35

45

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross—examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified. I have studied the whole record, the post trial briefs, and the authorities cited therein. Based on more detailed findings and analysis below, I conclude and find the Company violated the Act substantially as alleged in the complaint.

Findings of Fact

I. Jurisdiction, Labor Organization Status and Supervisory Status

The Company is a Delaware corporation with an office and place of business in Jefferson City, Missouri, where it is, and has been, engaged in the manufacture and non-retail sale of electrical transformers. During the twelve months ending January 31, 2009, a representative period, the Company sold and shipped from its Jefferson City, Missouri facility, goods valued in excess of \$50,000 directly to points outside the State of Missouri. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

It is admitted, and I find, that Matt Boyle, Michael Hoffman, Susan McAdams, and Eric Mercer are, among others, supervisors and agents of the Company within the meaning of Section 2(11) and 2(13) of the Act.

II. The Unit

It is admitted the following employees of the Company, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining with the meaning of Section 9(b) of the Act.

All production and maintenance employees employed by the Company at its Jefferson City, Missouri facility, excluding all office clerical and professional employees, technical employees, salaried employees, guards and supervisors as defined in the Act.

It is admitted that since about May 7, 1998, and at all material times, the Union has been the designated exclusive collective—bargaining representative of the Unit and since then the Union has been recognized as the representative by the Company. This recognition has been embodied in 1) A collective—bargaining agreement, effective from February 1, 1999 through January 31, 2002; 2) In the implemented "Terms and Conditions of Employment" effective from February 1, 2004 though January 25, 2008, and extended to February 4, 2008; and, 3) In a collective—bargaining agreement, effective from February 4, 2008 through February 3, 2012.

10

15

20

25

30

35

40

45

5

III. The Government's Evidence

A somewhat detailed review of the party's collective bargaining history is helpful background in deciding the issues surrounding the allegation of changes to the Code 18 Electronic Electrician job description.

Negotiations for the first collective bargaining agreement began July 1998, and, as just noted, resulted in an agreement effective from February 1, 1999 though January 31, 2002. Thirty three year employee Thomas Zewe served as a Union bargaining committee member and testified regarding the initial contract negotiations, however, the Union's chief spokesperson was Don Burgess. The first agreement did not contain job descriptions although job descriptions were discussed during the negotiations. Zewe testified that around November 1998, Burgess requested the Company provide a copy of all maintenance employee job descriptions. According to Zewe, the Company provided the copies including a job description for Code 18 Electronic Electrician. The Code 18 Electronic Electrician job description provided by the Company, at that time, was dated June 15, 1995, and approved and signed by Company Human Resources Representative R. L. Pickering and Manufacturing Manager R. Woods on August 14, 1997, [herein after referred to as the 1995 job description]. Zewe testified the Union reviewed the job descriptions, found them to be "pretty much" "what the proper job descriptions" were and Union spokesperson Burgess told the Company's Chief Spokesperson Human Resources Manager Stephen Buckley, the Union "could accept the job The Union informed the Company it wanted to spend time descriptions as written." negotiating other unresolved issues. Zewe said Burgess made no mention of waiving the right to thereafter bargain about job descriptions and added there were no further discussions of job descriptions during the initial contract negotiations that resulted in the 1999 to 2002 labor agreement.

Twenty year employee Richard Jorgensen participated in and testified regarding the contract negotiations that took place upon the expiration of the 1999 to 2002 agreement; however, Matt Snell was the Union's chief spokesperson at the negotiations. The negotiations started in 2002 and continued into 2004. Jorgensen testified the Union, on January 16, 2002, made several information requests of the Company including a request for a listing of the jobs in the plant and for existing job descriptions and codes for the jobs and the date of the last changes to the job descriptions. Jorgensen said the parties discussed job descriptions adding that Snell mentioned the Union had a book of job descriptions and asked Company Chief Spokesperson Buckley if any changes had been made to the job descriptions. Buckley said

there had not been any changes that everything remained the same. Buckley wrote on the Union's written request of January 16, 2002, that the job descriptions had already been provided and that Zewe confirmed that fact. Zewe testified Buckley said, "we had all copies of job descriptions and there had been no changes to the job descriptions." Zewe added, Buckley said "the ones we had in our possession that we received in the first negotiations were the job descriptions still in effect."

In 2004, the parties reached bargaining impasse and thereafter, from February 1, 2004 to February 4, 2008, operated under the Company's last, final and complete contract offer referred to as "Terms and Conditions of Employment."

Union Bargaining Chairman Jorgensen testified negotiations for the current collective bargaining agreement commenced in January 2006, and resulted in the agreement effective February 1, 2008 through January 31, 2012. Jorgensen said job descriptions were not discussed during these negotiations.

The Government contends the instant case actually begins on or about July 17, 2007, with an incident involving Code 18 Electronic Electrician employee Phillip Porter.

Union Steward Rice, a calibration analyst and twenty five year employee of the Company, testified that prior to his current job assignment he served as a Code 18 Electronic Electrician at the Company for approximately 3 years. Rice, at various times, also served as a Union Steward. Rice became involved as Union Steward for Porter on July 17, 2007, as a result of Porter being suspended pending an investigation regarding Porter's failure to perform a project assigned him by the Company. Rice was called to Maintenance Supervisor Michael Hoffman's office during the morning hours of the 17th to meet with Hoffman and Porter's immediate supervisor, Manufacturing Supervisor Eric Mercer. Rice was told the Company had a project on the three phase tank line they wanted Porter to perform and he would not agree to do so. Rice said he considered that whether an employee agreed to perform that type project was, as it had been in the past, voluntary.

Rice testified Hoffman and Mercer showed him a job description with yellow highlighted portions. Hoffman and Mercer told Rice the highlighted portions of the job description showed Porter should be able to perform the project and was, "what they felt was going to be their means to make him do this project." Hoffman and Mercer gave Rice a copy of the highlighted job description. Rice said he had seen the description before but it was at a time when it was unsigned and undated and he figured it was something the Company was working on. Rice explained he had seen the unsigned and undated job description on his supervisor, David Lunford's, office desk when he was a Code 18 Electronic Electrician. Rice was a Code 18 Electronic Electrician from approximately 2003 to 2006. Rice identified the Code 18 Electronic Electrician job description he was given on July 17, 2007, as one indicating it was revised in April 1999 (herein after the 1999 job description). Rice said he gave the job description [April 1999] to Union Bargaining Chairman Richard Jorgensen later that evening, July 17, 2007.

45

40

35

5

10

Jorgensen testified Union Steward Rice made him aware of Porter's suspension late on July 17, 2007, telling him Porter "had been suspended for allegedly refusing to do some work, which it has been the Union's position that it was beyond the scope of his job description." Jorgensen said Rice also gave him a copy of the job description the Company had given him that day when he met with them regarding Porter. Jorgensen testified he had never, prior to July 17, 2007, seen the job description Rice provided him that day. Jorgensen identified the job description given him that day as the 1999 Code 18 Electronic Electrician job description.

5

10

15

20

25

30

40

45

Jorgensen testified he and Union Spokesperson Snow met with HR Manager Matt Boyle on July 18 and 19, 2007, about Porter's situation, which Boyle informed them was under investigation, but the job description was not mention.

On July 26, 2007, Jorgensen and Rice met with HR Manager Boyle and Labor Relations Manager Susan McAdams at which time the Company provided the Union a proposal to resolve the Porter matter. Jorgensen testified it was at this point:

I asked the Company, now that I've had time to take a look at the 1999 job description and take a look at the ones that I have on file at the office that for sure this 1999 one has never been presented to the Union before. So I asked the Company, which of the two, the 1995 one, which we do have on file at the Union Hall, and this new 1999 one, which one that the Company feels is their current job description. Their reply was the 1999 one. My reply was if that is in fact the case, then I'm requesting negotiations.

Jorgensen said he had the 1995 job description with him, which had been approved (signed and dated), by the Company on August 14, 1997. Jorgensen said the 1995 job description for a Code 18 Electronic Electrician had been given to the Union in the book of job descriptions provided by the Company in 1999. Jorgensen testified the Union had never been given any Code 18 Electronic Electrician job description other than the 1995 description. According to Jorgensen, HR Manager Boyle nor McAdams made any response to his request to negotiate the Code 18 Electronic Electrician job description.

Jorgensen testified the Union and Company met and exchanged counter proposals and additional proposals on August 2 and 7, 2007, regarding the Porter matter.

Jorgensen met with HR Manager Boyle and Labor Relations Manager McAdams on August 10, 2007, and told them the Company's proposals were unacceptable to Porter. Jorgensen said he knew what was then going to happen; that if Porter did not take voluntary retirement, the Company would terminate him. Jorgensen testified,

So, again, I requested that if your position is still the same, that the 1999 job description is your current job description, again, I'm requesting negotiations.

Jorgensen said the Company made no response to his request. Porter was terminated on August 10, 2007, and Jorgensen filed a grievance on his behalf on August 14, 2007.

IV. The Company's Evidence

5

HR Manager Buckley testified he served as chief spokesperson for the Company during the 1998 negotiations for an initial contract. According to Buckley, the Union requested to negotiate unit job descriptions. Buckley said the subject matter, thereafter, came up from time to time. Buckley said the Union, because of a press for time, informed the Company sometime in October 1998, "they did not want to spend the time to negotiate[e] over the job descriptions," that their time could be better spend on other areas of disagreement. Buckley agreed, the Company would be willing to negotiate job descriptions at a later time. As noted elsewhere, the parties arrived at their initial agreement in February 1999.

15

20

25

10

HR Manager Buckley testified the parties commenced very extended bargaining in the first week of January, 2002 toward a successor collective bargaining agreement. Buckley said about a week or two after bargaining began the Union made, in writing, an information request of the Company for, among other things, a copy of all job descriptions. The Union's request dated January 16, 2002, specifically requested, "existing job descriptions and codes for jobs in the plant at the current time and date of last change." Buckley told Union Chief Spokesperson Matt Snell, as they discussed the Union's various information requests, the Union did not need to again ask for job descriptions; "you already have the job descriptions in the union hall." Buckley noted the codes were already defined in the collective bargaining agreement. Buckley testified Union bargaining committee member Zewe agreed with his (Buckley's) comments and added, "yes, they are in the union hall, we have it." Buckley testified that at some point the job descriptions were, in fact, updated or revised. He testified:

30

"There had been some revisions, nothing major, you know, onesie, twosie kind-of changes.

There had been some revisions, but, the — , not close in the timeframe of 2002.". . . .

35

They were prior to, long time prior to.

Buckley said he was referring to the active job descriptions when he made reference to the Union already having the job descriptions. According to Buckley current job descriptions are kept in a "three ring binder type book" in the HR offices.

40

Buckley testified that "periodically", during the extended contract negotiations that started in January 2002, the subject of job descriptions would come up and then go away but, "It just was never formally bargained."

45

Former HR Hourly Employee Relations Manager Robert Pickering, who reported to HR Manager Buckley, testified he maintained job descriptions in a three ring binder in his

office on his credenza. Pickering testified that, on June 24, 1999, he received a written request from Union bargaining committee member Zewe for Material Marshaller A and B job descriptions which he provided. Pickering made a notation to himself on Zewe's request that this was the second time he had provided this information to the Union. Pickering also noted on the request, "we ran a complete copy and gave to the Union previously, also." Pickering explained "a complete copy" meant he gave the Union a copy of all the job descriptions and added; "It would have been in the summer of '99, prior to the date of 6/24/99".

5

10

15

20

25

30

35

Pickering said he gave the complete revised (April 1999) job descriptions to the Union Chairperson Thomas Shackelford. Pickering testified that in April 1999, he updated all Occupational Progression Channel (OPC) numbers on all job descriptions based on what had been negotiated in the collective bargaining agreement. Pickering said that when the OPC numbers were updated, the job descriptions, if needed, were also revised. He testified, revisions were made in April 1999, and he thought some of the job descriptions were in fact revised and added, "but, I can't tell you the list of what jobs would have been [revised]." According to Pickering, the Code 18 Electronic Electrician job description was included in the job descriptions he gave to Shackelford during the summer of 1999.

Pickering testified he provided union bargaining committee member Zewe a one page copy of all maintenance employee job codes on September 15, 1999. Pickering said he not only gave Zewe the job codes but added, "He would have received a complete set of job descriptions, along with this document".

Thomas Shackelford worked at the Company from October 1972 until February 2003, in various positions as a maintenance employee, manager and supervisor. Shackelford testified that for part of 1999, he was Chairperson of the bargaining committee for the Union. Shackelford said his time as Chairperson was after the parties had arrived at an initial collective bargaining agreement. Shackelford testified that some where in the middle of June 1999, Former HR Hourly Employee Relations Manager Pickering gave him a list of the job descriptions and; "He explained to me, that's what they were and that they were requested from him and he gave them to me." Shackelford testified he was not sure if he was told what time period the job descriptions covered but added they were the revised ones. Shackelford said the job descriptions were contained in a binder but he did not go through them. Shackelford said that within a day or so he took the job descriptions to the Union hall laid them on a table but did not know what, thereafter, happened to them. Shackelford could not recall who, from the Union, requested the job descriptions and on cross—examination said it could have been him. Shackelford said the Union requested the job descriptions because of the OPC's being changed.

On cross—examination Shackelford acknowledged the Union removed him as Chairperson but four months later reinstated him. He thereafter resigned. Shackelford first testified he had not spoken with anyone about his testimony before testifying. Shackelford specifically said no one contacted him nor had he talked with anyone about his testimony prior to testifying. However, after being asked by Company Counsel on redirect, he acknowledged company counsel had contacted him and asked him questions about the job descriptions and Pickering.

Labor Relations Manager Susan McAdams testified that in March 2005, Union International Representative John Morris came to the Company to review the maintenance jobs and job descriptions to ascertain if the maintenance department qualified for the Union's journeyman program. McAdams attended a meeting with Morris, HR Manager Buckley and Union Chairperson Jorgensen about maintenance employee job descriptions. McAdams said Morris told them he had reviewed the maintenance job descriptions and had a copy of the descriptions with him at the time. McAdams testified Morris did not ask HR Manager Buckley for job descriptions nor did he express a need for job descriptions. According to McAdams, they discussed at their meeting, the Code 18 Electronic Electrician job description. McAdams said she did not examine to see what job descriptions Morris actually had with him nor did he show the descriptions to her.

Former HR Hourly Employee Relations Manager John Lee Suttenfield, III, testified he commenced working for the Company in May 1976, and became an HR Manager in July 2002. He said he was advised by e-mail in 2005, that Union International Representative Morris was coming to visit the Company in connection with the possibility of establishing a journeyman training program at the Company for maintenance employees. Suttenfield said he was provided a sample form letter from the Union regarding certain information on each maintenance employee the Union wanted. The information the Union requested was for the employees name, social security number, and dates and classifications. Suttenfield prepared the information on each maintenance employee and presented it to HR Manager Buckley who in turn provided the information to Union Chairperson Jorgensen. Suttenfield testified Jorgensen did not ask for any maintenance employee job descriptions, that Jorgensen told him he already had the job descriptions. Suttenfield said he kept a copy of all maintenance employee job descriptions, in a binder, in a metal cabinet in his office.

Manufacturing Supervisor Eric Mercer testified the Company decided in July 2007, that a transfer cart improvement was needed to move products throughout the Company and established a project toward that end. Mercer discussed the matter with Company Process Engineer Phillip Schieffer and it was decided to assign the transfer cart job duties to Phillip Porter, a Code 18 Electronic Electrician.

Mercer and Schieffer met with Porter on July 16, 2007, and told him he would have responsibility for the project. According to Mercer, Porter first raised some safety concerns about the project but then stated he would not take the job because it was outside the scope of his electrician's job. Mercer ended the meeting telling Porter he would investigate whether the job was within the scope of Porter's duties.

Mercer met with his immediate supervisor, as well as, with Maintenance Supervisor Hoffman. Hoffman gave Mercer a copy of Porter's current job description. Hoffman testified he highlighted portions of the job description that pertained to the job Porter was being asked to perform. Hoffman gave Mercer the April 1999 copy of the Code 18 Electronic Electrician job description.

45

5

10

15

20

25

30

JD(ATL)-17-09

Mercer testified he scheduled a second meeting with Porter for the next morning July 17, 2007. Mercer, Supervisor Shane Stewart and Porter attended. Mercer testified.

I explained to Mr. Porter that I'd investigated his statement that the job was outside of his scope. I told him directly that on my investigation the job was within his scope and handed him the job description. He looked at it briefly. He said that, yes, he's familiar with it, he helped write it, and handed it back to me.

Mercer said Porter refused the assignment, in part, because in the past he had received higher pay for performing additional duties and explained he no longer received the higher pay so the job was no longer within his scope. Mercer told Porter he would take it to the next step. Porter asked for union representation. Mercer contacted Union Steward Rice and arranged another meeting for later that day.

Mercer, Hoffman, Rice and Porter met later that day. Mercer testified he handed Rice a copy of Porter's job description with selected portions highlighted but Rice handed it back saying he recognized it as the correct description for Porter's job. Hoffman testified he tried to give Rice a copy of the job description with highlighted portions but Rice looked at it and returned it because he had a copy and knew what was in it. Porter's matter was not resolved at this meeting.

Mercer testified that after the meeting Rice told him he would talk with Porter "to convince him to take on the assignment."

Hoffman testified Union Steward Rice reported back to Mercer that Porter was not going to do the Job. Mercer then brought Porter to Hoffman's office where, according to Hoffman, Porter repeatedly refused to do the job.

Hoffman, Mercer and Porter then proceeded to the Human Resources Department. Hoffman asked Union Steward Rice to join them. Hoffman testified; "we went back over the scenario" and Porter kept refusing to do the job and was suspended pending further investigation.

HR Manager Matt Boyle testified that following Porter's suspension he met with Union International Representative Snow and Union Bargaining Chairman Jorgensen on July 18, 2007, at a third step prescheduled grievance meeting unrelated to Porter's situation. Boyle said he and Jorgensen traded Code 18 Electronic Electrician job descriptions. Boyle explained he gave Jorgensen the most updated April, 1999 description while Jorgensen gave him the 1995 description. Boyle said he and Jorgensen had also spoken the day before about Porter. Boyle testified they then discussed what portions of the 1999 job description covered the duties the Company was asking Porter to perform. Boyle specifically stated that neither Snow nor Jorgensen made any request on either July 17 or 18, 2007, to bargain over the job description.

45

40

5

20

25

30

Boyle testified a third step meeting was held on July 31, 2007, at which Porter's situation was discussed but stated neither Snow nor Jorgensen made any request to bargain over the Code 18 Electronic Electrician job description. Boyle testified that neither Snow nor Jorgensen requested, at any time, from July 18, 2007, through the end of 2007 to bargain about the Code 18 Electronic Electrician job description. Boyle added that as of the trial herein, the Union had not made any request, in writing, to bargain about the Code 18 Electronic Electrician job description.

HR Manager Boyle testified he met in his office on August 10, 2007, with Labor Relations Manager McAdams and Jorgensen and made a proposal to settle the Porter matter. He said his proposal was rejected and he notified Jorgensen the Company's final decision was to terminate Porter.

V. Analysis, Discussion and Conclusions

15

20

25

10

5

It is well settled and accepted that absent waiver or impasse an employer may not unilaterally change terms and conditions of employment for employees represented by a labor organization. *NLRB v. Katz*, 369 U.A. 736 (1962). Stated differently, as a general proposition an employer commits an unfair labor practice if, without bargaining to impasse or obtaining a waiver, it effects a unilateral change of an existing term or condition of employment. *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991). It is undisputed the production and maintenance employees herein were and continue to be represented by the Union in an appropriate unit. It is undisputed the Company has recognized the Union as the exclusive collective bargaining representative of its employees and has entered into two collective bargaining agreements with the Union covering the employees. The second of the collective bargaining agreements is currently in effect. It is undisputed the Company had certain job descriptions in effect at the time the parties commenced negotiation for an initial collective bargaining agreement in July 1998. Included therein was a job description for a Code 18 Electronic Electrician dated June 15, 1995, and approved and signed by the Company on August 14, 1999.

35

30

It is undisputed the Company in April 1999, changed some job descriptions and specifically changed the job description for a Code 18 Electronic Electrician, the job description at issue herein.

Numerous terms and conditions of employment have been held to be mandatory subjects of bargaining and the Company herein does not question that job descriptions are a term and condition of employment and a mandatory subject of bargaining. For that matter, HR Manager Buckley agreed during the 1998 negotiations for the initial collective bargaining agreement the Company would negotiate concerning job descriptions.

40

45

It is likewise undisputed that the 1999 Code 18 Electronic Electrician job description was not signed by any Company official. It is undisputed that the Union learned on or about July 17, 2007, the Company considered the 1999 Code 18 Electronic Electrician job description to be in effect at that time because it advised Code 18 Electronic Electrician Porter it was assigning him job duties for a work project pursuant to duties outlined in the 1999 job

description. The Union was notified on that same date and began at that point to represent Porter before the Company.

The question then becomes; did the Company make the Union aware of the April 1999 changes to the 1995 job descriptions at any time prior to July 17, 2007?

5

10

15

20

25

30

35

40

45

I note that while the general proposition holds an employer commits on unfair labor practice if, without bargaining to impasse or obtaining a waiver, it effects a unilateral change to existing terms and conditions of employment; an employer is not absolutely prohibited from making changes, however, an employer is required before making changes in "terms and conditions of employment" pursuant to Section 8(d) of the Act, to notify the union before effecting the changes so as to provide the union a meaningful opportunity to offer counterproposals and counter arguments. If upon notification by an employer, the union does not timely request bargaining, the employer is then free, under the Act, to make the changes outlined in its proposal for changes.

Back to the question of whether the Company herein provided notice of the 1999 changes to the job descriptions prior to July 2007, and if so, did the Union timely seek or request bargaining with the Company? In order to answer certain of these questions it is necessary to make some credibility determinations.

Although many of the facts herein are undisputed and/or admitted, there are some sharp credibility conflicts in the accounts of relevant events provided by certain witnesses regarding notice to the Union of the revised 1999 job descriptions specifically of the Code 18 Electronic Electrician job description at issue herein.

It is appropriate to make certain observations regarding my credibility resolutions. I have carefully reviewed the trial record and exhibits whether or not I have made reference to or discussed such herein. There are certain credibility resolutions that are essential to resolve. However, I have not attempted to resolve and/or reconcile every conflict; only those I deem pertinent in resolving the issues herein. When necessary to resolve conflicting testimony my findings have rested, to a degree, on witness bias established, admitted or uncontested facts, corroboration of testimony and inherent probabilities. In addition to the above considerations I was greatly impacted by impressions I formed while watching the witnesses as they testified. The impressions I gathered were based on a combination of the witnesses' mannerisms, how they spoke and their overall, "on the witness stand" bearing. I, to use a colloquial expression, "sized up" the witnesses in deciding whether their testimony struck me as fair, candid and believable. Having said that I certainly am not unmindful that resolutions of credibility conflicts are often difficult, requiring the weighing of plausible narrations of testimony by witnesses who appear truthful and no more biased or prejudice than others testifying differently. Indeed, resolutions by a judge, or a jury in a jury trial, are simply a practical solution, not a mark of absolute truth.

I find there is a lack of reliable, credible and valid evidence the Company notified the Union of changes to the 1995 job descriptions or that the Company, after the start of negotiations in 1998, provided the Union copies of the revised job descriptions prior to July

2007. In arriving at these findings, I credit the testimony of Government witnesses Jorgensen, Zewe and Rice, and where in conflict, I do not accept the testimony of Company witnesses Buckley, Pickering and Shackelford. Jorgensen, Zewe and Rice, all currently employed by the Company, appeared to be truthfully testifying, as best they could, about the job descriptions and when and how that subject came up over the years including in bargaining negotiations.

During negotiations for the initial contract between the parties the Union, in November 1998, requested, and the Company provided, a copy of all maintenance employee job descriptions including the description for the Code 18 Electronic Electrician position. The Code 18 Electronic Electrician job description provided was dated June 15, 1995, and had been approved and signed by Company representatives on August 14, 1997. Zewe credibly testified the Union at the beginning of the initial negotiations reviewed the job descriptions and concluded the descriptions pretty much described the duties the maintenance employees performed in the various jobs. The Union at that time accepted the job descriptions as written but made no mention of waiving the right to thereafter bargain concerning job descriptions. Company HR Manager Buckley said that during the 1998 negotiations the Company agreed it would be willing to negotiate job descriptions at some future date. The credible evidence establishes this 1998 occasion just described was the only time the Company provided the Union with job descriptions of <u>all</u> maintenance employees until the Company brought the issue back to the front when it provided the Union a revised job description for a Code 18 Electronic Electrician in July 2007.

Former HR Hourly Employee Relations Manager Pickering kept employee job 25 descriptions in a binder on the credenza in his office. Pickering testified, and it is not disputed, that Union bargaining committee member Zewe, on June 24, 1999, requested, in writing, job descriptions for the Material Marshaller A and Material Marshaller B positions and Pickering provided the two requested job descriptions to the Union and noted that fact on Zewe's written request. Pickering also noted on Zewe's request, "This is the 2nd time I gave this to Tom and we ran a complete copy and gave to the Union previously also." Pickering 30 added, "I would have given them to the Union." I do not credit Pickering's explanation that he gave a "complete copy" of the job descriptions to the Union, specifically to then Union Chairperson Shackelford in the summer of 1999. In light of certain Union official's denials, my total rejection of Shackelford's testimony and the logical sequence of events, I simply find 35 Pickering's testimony about providing Shackelford a copy of the revised job descriptions in the summer of 1999, to be unbelievable. There is no showing the Company had advised the Union of any revisions to the job descriptions that might have alerted the Union to make any such request. Although Pickering testified he updated the Occupational Progression Channel numbers for the maintenance employees in April 1999, and he thought some job descriptions were in fact, revised at the time, he could not say which jobs were revised nor did he say the 40 Union was notified the Company had made or was making any such revisions. There was no stated reason for the Union to have requested a complete copy of all job descriptions at the time not knowing of any revisions. I do not find believable the testimony that the Company just continued to supply copies of the job descriptions over and again to the Union.

45

5

10

15

I do not credit former Chairperson for the Union bargaining committee, as well as, Former Manager and/or Supervisor Shackelford's testimony about being given a revised copy of the job descriptions for the maintenance employees in book binder form in June 1999, while he was serving as Chairperson for the Union. In addition to my having carefully watched Shackelford as he testified there are a number of other factors that causes me to 5 reject his testimony. First, I note Shackelford seemed to have little problem recalling a specific conversation that occurred 10 years ago with Former HR Hourly Employee Relations Manager Pickering and at a time when he had been retired and away from the Company for six years but had trouble recalling certain other things fully or accurately. He recalled he was 10 specifically told the job descriptions were the revised ones but only after first being asked in a leading manner and then by questions that inferred or suggested the answer sought. Shackelford, on direct examination, could not recall being told what time period the job descriptions covered nor, at first, could he say if he received all of the job descriptions explaining he did not go through them. Second, on cross-examination by Government Counsel, Shackelford testified he resigned his Chairperson position with the Union; and only 15 on cross-examination, by Union counsel did he acknowledge the Union membership had removed him as chairperson, later reinstating him and he then, thereafter, resigned. It seemed to me Shackelford did not wish to be fully candid in his testimony. Thirdly, in discrediting Shackelford, I note he could not recall, when questioned on cross-examination by 20 Government Counsel, who from the Union had requested the job descriptions he asserted he was given. When pressed further on cross-examination by Union Counsel, Shackelford was again not sure who from the Union requested the job descriptions he said he was given. After being questioned about the power held by those in leadership positions at the local Union Shackelford acknowledged he was assumedly the most powerful person but still again could not recall who from the Union might have requested the job descriptions. He then added he 25 probably requested them himself. Shackelford then testified he requested the job descriptions at the behest of the shop stewards, yet, even though he claimed he requested the job descriptions, he did not even examine them to see what he had been provided but merely took the job descriptions to the Union hall and placed them on a table. Simply stated, and as 30 previously noted, I do not credit Shackelford's testimony. With regard to Shackelford's creditability one factor was very persuasive, namely, his specifically denying, on crossexamination, of having spoken with anyone prior to testifying at trial about his testimony regarding job descriptions. He specifically stated, on cross-examination by Union Counsel, that he answered the questions he was asked about the job description conversations he had 35 that took place 10 years ago for the very first time when he responded to those questions on direct examination. On redirect, Shackelford acknowledged he had been questioned by Company Counsel regarding, among other things, whether he had gotten job descriptions from Pickering years ago. I am persuaded Shackelford wanted to mold and shape his testimony in a manner he perceived would help the Company without regard for being candid and telling the full and complete truth. 40

I find no credible evidence that Shackelford requested from the Company and/or provided the Union with a copy of job descriptions in June 1999.

Former HR Employee Relations Manager Pickering testified, without challenge, that on September 15, 1999, he provided the Union, specifically Zewe, a one page list of all job

codes and titles for the maintenance employees and wrote on the list "given to Tom Zewe 9-15-99, at 9:00 am." I do not credit Pickering's further testimony that he also provided Zewe a complete set or copy of all job descriptions at the same time he gave Zewe the one page list of job codes. First, there is no showing the Union requested a copy of all the job descriptions, nor is it shown the Union was aware of any April 1999 Company revisions of job descriptions. Second, Pickering made no notation he had, yet again at that particular time, provided a copy of the job descriptions to the Union. Third, Zewe denied being given any copies of revised job descriptions.

5

10

15

20

25

30

35

It is undisputed the parties commenced negotiations in 2002, for a successor collective bargaining agreement. It is uncontested the Union, on January 16, 2002, made a number of requests for information from the Company including a request for "existing job descriptions and codes for jobs in the plant at the current time and date of last change." I specifically credit Jorgensen's testimony Company Chief Spokesperson and/HR Manager Buckley said there had not been any changes to the job descriptions that everything remained the same. I also specifically credit Zewe's testimony that Buckley told them the job descriptions the Union "had in our possession that we received in the first negotiations were the job descriptions still in effect" "...and there had been no changes to the job descriptions." I reject Buckley's testimony, to the extent it suggests, he gave a copy of the job deceptions to the Union several days after the 2002 negotiations began.

Jorgensen credibly testified that during the 2002 negotiations and until the Company implemented its Terms and Conditions of Employment, job descriptions were not discussed and were not part of the 2004 implemented Terms and Conditions of Employment. HR Manager Buckley testified that periodically during the extended contract negotiations starting in January 2002, the subject of job descriptions would come up and go away but never formally bargained about.

It is undisputed that Union International Representative John Morris visited the Company on March 10, 2005, regarding the Union's journeyman program. Morris reviewed maintenance jobs, observed maintenance employees working. Morris advised HR Manager Buckley and Labor Relations Manager McAdams he had reviewed the job descriptions and had copies with him at the time. The job descriptions were provided to Morris by Union Bargaining Chairman Jorgensen. The Company did not provide Morris any job descriptions nor did either Buckley or McAdams review the job descriptions Jorgensen had provided to Morris. Again, to this point, there is no credible showing the Company provided the Union with all the revised 1999 job descriptions or specifically provided the Union the revised Code 18 Electronic Electrician job description.

There is no evidence the Company provided the Union a copy of the revised job descriptions in January 2006, at the start of contract negotiations resulting in the current collective bargaining agreement. I credit Jorgensen's testimony that job descriptions were not discussed during these negotiations.

It is undisputed that on July 16, 2007, Manufacturing Supervisor Mercer and Process Engineer Schieffer met with Code 18 Electronic Electrician Porter about a specific job

assignment the Company wanted Porter to perform. It is likewise undisputed Porter raised safety concerns about the project and advised he could not take the assignment because it was outside the scope of his job description. It is undisputed Mercer agreed to look into the job description issue and get back with Porter.

5

10

15

20

25

30

It is undisputed that on July 16, 2007, Supervisor Mercer discussed the Code 18 Electronic Electrician job description with Maintenance Supervisor Hoffman. Hoffman gave Mercer a copy of the job description with highlighted portions that pertained to Porter. It was concluded by Hoffman and Mercer the duties Porter was asked to perform where within the duties outlined in the job description.

It is undisputed Mercer met with Porter and Supervisor Steward on the morning of July 17, 2007. It is undisputed Mercer showed Porter the job description and Porter continued to refuse to perform the job duties because he was not paid extra for doing so and the duties requested were not within the scope of his duties. Mercer told Porter he would take his refusal to the next level and Porter asked for Union representation. It is undisputed Mercer contacted Union Steward Rice and arranged for another meeting on the issue that day.

It is undisputed Union Steward Rice met with Supervisors Hoffman and Mercer in Hoffman's office mid-morning on July 17, 2007, to discuss the Porter matter. Rice told the Company he considered the assignment for Porter to be voluntary. It is undisputed Hoffman and Mercer showed Rice a copy of a Code 18 Electronic Electrician job description. Rice acknowledged he had seen the job description before at sometime between 2003 to 2006 when he, Rice, was a Code 18 Electronic Electrician, but he explained, the one he saw then was unsigned and undated and he assumed it was simply a work in progress by the Company. I credit Rice's testimony that he was given the highlighted copy of the job description notwithstanding the testimony by Company witnesses they only showed him the copy. I am fully persuaded that after the Company took the time to highlight the job description in order to demonstrate their position Porter could be required to do the job, they wanted Rice to take the copy and review it. I credit Rice's testimony the highlighted Code 18 Electronic Electrician job description he was given indicated it was revised April 1999. As the evidence discussed hereinafter will further demonstrate, I find this was the first time the Union had been placed on notice or made aware the Company had changed the Code 18 Electronic Electrician job description from the 1995 job description the Union had been given in 1998.

35

40

45

It is undisputed Porter was suspended pending investigation on July 17, 2007. I credit Jorgensen's testimony that on July 17, 2007, Union Steward Rice made him aware of Porter's suspension and gave him the highlighted copy of the Code 18 Electronic Electrician job description Rice had been given by Hoffman and Mercer. I specifically credit Jorgensen's testimony he had never, prior to that date, seen that revised job description before. Jorgensen identified the job description he was given that day as the 1999 Code 18 Electronic Electrician job description.

It is undisputed there were discussions on July 18, and 19, 2007, concerning the Porter matter but nothing was resolved.

I credit Union Bargaining Chairman Jorgensen's testimony regarding the meeting he and Union Steward Rice had with HR Manager Boyle and Labor Relations Manager McAdams on July 26, 2007. The Company provided a proposal to resolve the Porter matter but it was unacceptable to Porter. Jorgensen explained to Boyle and McAdams he had examined the 1999 job description they had given the Union on July 17, 2007, and "for sure this 1999 one has never been presented to the Union before." Jorgensen asked, "which of the two, the 1995 one" that the Union had on file at the Union hall, or, "this new 1999 one" did the Company contend was the "current job description." Jorgensen was told the 1999 one. I specifically credit Jorgensen's testimony; "my reply was if that is in fact the case, then I'm requesting negotiations."

It is undisputed the Company and Union met on more than one occasion in early August in an effort to resolve the Porter matter but without success.

15 It is undisputed Jorgensen met with Boyle and McAdams on August 10, 2007, at which time the Company's proposal to settle the Porter matter was rejected. It is undisputed the Company's decision at that time was to terminate Porter. What is disputed is whether Jorgensen requested negotiations regarding the revised job description. HR Manager Boyle denied Jorgensen ever made a request to bargain the April 1999 job description. I, however, 20 credit Jorgensen's testimony he told Boyle and McAdams that if their position, "is still the same, that the 1999 job description is your current job description, again, I'm requesting negotiations." In addition to my earlier described observations regarding Jorgensen's demeanor, I note the Union consistently took the position the job descriptions were negotiable and upon learning the Company had changed the Code 18 Electronic Electrician job 25 description it is logical and extremely likely Jorgensen again requested negotiations as he had earlier done on July 26, 2007.

In summary to this point, it is clearly established and I find, the Company initially changed the Code 18 Electronic Electrician job description in 1999 without prior notice to the Union. Notice was first provided to the Union when the Company implemented its unilaterally changed Code 18 Electronic Electrician job description on July 17, 2007. It is clear that almost immediately, that is on July 26 and August 10, 2007, the Union requested negotiations regarding the Code 18 Electronic Electrician job description. It is clearly established the Company failed and refused to bargain as requested.

35

40

45

30

5

10

I turn now to the issue of whether the unilateral changes to the Code 18 Electronic Electrician job description were material, substantial and significant. Generally, an employer has a duty to bargain with its employees exclusive collective bargaining representative before making changes in wages' hours or other terms and conditions of employment; however, that duty only arises if the changes are material, substantial, and significant ones affecting the terms and conditions of employment. *Millard Processing Services*, 310 NLRB 421, 425 (1993).

The duties in the 1999 job description for the Code 18 Electronic Electrician were enhanced over the duties outlined in the 1995 job description. Duties that were added in the 1999 job description listed under "Position Summary" included: "modify and edit machine

language controls", "build machine controls, GW basic and visual basic programming", and "setting up computer systems and installing various software systems." There is a completely different list of tools needed in the 1999 job description from the 1995 job description. In the 1995 job description the workers were required to have items such as volt meters, tube testers, small hand tools, grinders and sanders. Under the 1999 "Tools and Equipment" portion of the job description the workers are required to have various equipment including scope meters, circuit board testers, Quad and Dual trace scopes, robot and CNC programming and diagnostic equipment and all plant computer systems including various software and processors. The "Materials" section of the 1999 job description is revised completely. Some of the materials listed in the 1999 job description but not included in the 1995 job description were: "Hydraulic servo, transducers, E-proms, encoders, power supplies, PC boards, DC drivers, transformers, PLC's, converters, rectifiers, SCR's, diodes, capacitors, transistors, motors, starters, switches, coils, conduit and fittings, relays [and] timers". The 1999 job description under "Essential Functions" added 14 new functions for the Code 18 Electronic Electrician to perform. Some of the additional functions included: "design and fabricate electronic controls", "develop and assemble upgrades to electronic controls", "test, repair and set up hydraulic servo controlled equipment", "understand and use various machineprogramming languages" and "calibrate robot arm and re-teach". The 1999 job description contains a newly required "Education, Experience and Skills, Required" section that sets forth specific educational degrees and/or training requirements for the job.

It is clear, and for that matter does not appear to be challenged, that the changes to the Code 18 Electronic Electrician job description, contained in the 1999 revision, were material, substantial and significant.

25

30

35

40

45

5

10

15

20

I find the Company unilaterally changed the Code 18 Electronic Electrician job description, as implemented, on July 17, 2007, and refused on July 26 and August 10, 2007, after being requested by the Union, to bargain about the Code 18 Electronic Electrician job description. These acts of the Company violate Section 8(a)(5) and (1) of the Act and I so find.

I turn now to the certain defenses raised by the Company and, as explained below, find each is without merit. The company asserts the changes to the Code 18 Electronic Electrician job description took place in April 1999, and notes the Union did not file its unfair labor practice charge until January 16, 2008, (approximately 7½ years thereafter) well outside the 6 month statue of limitation imposed by Section 10(b) of the Act. Simply stated, in the Company's view, the charge is time barred by Section 10(b) of the Act.

Section 10(b) of the Act provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." Here the facts establish the Union did not have notice of changes to the Code 18 Electronic Electrician job description until July 17, 2007. There is simply no credible showing the Union had clear and unequivocal notice of the changes prior to that time. Thus, the charge was timely filed and is not barred by the Section 10(b) statute of limitations.

The Company also contends it is entitled to dismissal of the allegations set forth in the Government's amendment to amended complaint wherein it is alleged the Company failed and refused to bargain in response to alleged oral bargaining requests from the Union because no just circumstances existed to allow the Government to validly amend its already amended complaint. I reject the Company's assertions on this point. I have concluded the Company's unilaterally changing the Code 18 Electronic Electrician job description violated the Act and was based on a timely filed charge. The Union did not become aware of the changes to the job description in question until the Company held Code 18 Electronic Electrician Porter to the revised standards contained therein and disciplined him as a result thereof. Immediately upon notice of the changes the Union asked to bargain about the revised job description. Bargaining over the changes to the Code 18 Electronic Electrician job description flows out of and is inextricably intertwined with the unilateral change of the job description itself. Each arose from the same factual circumstances and are part of the continuing sequence of events. The bargaining request issue is sufficiently grounded in the original timely file charge such as to support the complaint allegations related to the bargaining requests. The mere fact the Government waited until a few days before trial to amend the amended complaint to include the bargaining request in no way warrants a different conclusion.

The Company's contention the Union waived its right to bargain over the substance of the April 1999 revisions of the Code 18 Electronic Electrician job description is without merit. The record evidence establishes the Union never at any time clearly and unmistakably waived its right to negotiate job descriptions. Quite the contrary, the Union, from the initial contract negotiations, made it clear to the Company it was not waiving its right to negotiate job descriptions. The Company acknowledged the Union was not waiving its right to negotiate job descriptions even expressed the Company's willingness to thereafter negotiate job descriptions. The Union at the start of each of the negotiations toward a new collective bargaining agreement inquired about the status of the job descriptions and was told each time the job descriptions remained the same. The Union did not waive its right to negotiate job descriptions by inaction. In fact as soon as the Union was put on notice of changes to the Code 18 Electronic Electrician job description in July 2007, it immediately sought to bargain over that job description.

Conclusions of Law

35

45

5

10

15

20

25

- 1. The Company, ABB, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. Local 2379, United Automobile, Aerospace & Agricultural Workers of America is a labor organization within the meaning of Section 2(5) of the Act.
 - 3. The Company violated Section 8(a)(5) and (1) of the Act by on or about July 17, 2007 unilaterally changing the job description for Code 18 Electronic Electricians; and, by on or about July 26 and August 10, 2007 failing and refusing to bargain with the Union over the Code 18 Electronic Electrician job description.

4. The Company's unfair labor practices specified in 3 above, affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Remedy

5

Having found that the Company has engaged in certain unfair labor practices, I find it necessary to order the Company to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act as set forth in the recommended **Order** below.

10

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁴

ORDER

15

The Company, ABB, Inc., Jefferson City, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

20

- (a) Unilaterally changing the Code 18 Electronic Electrician job description, or any other job description, without prior notice to the Union and without affording the Union the opportunity to bargain with respect thereto.
- 25 (b) Failing and refusing to bargain with the Union concerning changes to the Code 18 Electronic Electrician or any other job description.
 - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

30

- 2. Take the following affirmative action:
- (a) Upon request of the Union rescind the April 1999 Code 18 Electronic Electrician job description and bargain in good faith with the Union concerning changes to the Code 18 Electronic Electrician job description.
 - (b) Post at its Jefferson City, Missouri, facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by the Company's authorized representative, shall be

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD(ATL)-17-09

posted by the Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facilities involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Company at any time since July 17, 2008.

10 (c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Company has taken to comply herewith.

Dated, Washington, D.C., September 4, 2009.

15

5

William N. Cates
Associate Chief Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change the Code 18 Electronic Electrician job description, or any other job description, without prior notice to the Union and without affording the Union an opportunity to bargain with respect thereto.

WE WILL NOT fail and refuse to bargain with the Union concerning changes to the Code 18 Electronic Electrician or any other job description.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request of the Union, rescind the April 1999 Code 18 Electronic Electrician job description and bargain in good faith with the Union concerning the Code 18 Electronic Electrician job description.

		ABB, Inc.		
Dated:		(Employer)		
	By: _			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret—ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103–2829 (314) 539–7770, Hours 9a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (314) 539–7780.